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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

GORDON REEVES,
Petitioner

v.

THE FEDERAL ENERGY ADMINISTRATOR AND THE COMMISSIONER OF INTERNAL REVENUE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Gordon Reeves petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) is not yet reported. The

findings of fact and conclusions of law of the district court (App. B, infra) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1974, and no petition for rehearing was filed. The jurisdiction of this Court is invoked under § 211(g) of the Economic Stabilization Act, PL 92-210 (December 22, 1971) and 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a court, reviewing the exercise of adminstrative discretion to dispense with rulemaking procedures of 5 U.S.C. §553, may uphold the summary issuance of energy regulations by finding, upon "judicial notice" and not by reviewing the basis relied upon by the Administration, that "good cause" existed for dispensing with rulemaking procedure, when the agency relied upon the "interpretative rules" exemption from such procedures.

2. Whether a regulation that imposes new and substantial restrictions upon the sale of gasoline by service station retailers, is interpretative rather than substantive, thereby permitting its promulgation without the notice and participation provisions of 5 U.S.C. §553.

3. Whether the Federal Energy Office, which was required by the Emergency Petroleum Allocation Act to submit imple-

menting regulations to the Federal Trade Commission and Department of Justice for review of possible anticompetitive effects, was also required by the Act similarly to submit an amendment to the regulations which substantially expanded their scope by creating a brand new restriction on retail service station dealers' sale of gasoline.

4. Whether a Federal Energy Office regulation, requiring service station retailers to spread short supplies of gasoline among all members of the motoring public, without also establishing any priorities as required by the Allocation Act, imposed upon retail dealers the establishment and operation of a consumer rationing system, in excess of the jurisdiction bestowed on the FEO by the Act.

5. Whether a regulation requiring petroleum retailers to expand their customers without allowing any concomitant increase in gasoline supplies, unlike all other sectors of the petroleum industry which could obtain increased fuel allotments for serving new customers, is arbitrary and discriminatory.

6. Whether a regulation prohibiting service station retailers from reserving any fuel supply for established purchasers is arbitrary and discriminatory because, as the district court found, its operation threatened the economic survival of retailers, would not effect any reasonably equal distribution of fuel to motorists, worked a substantial disruption of

existing retail market mechanisms, and threatened accelerated integration of the petroleum industry, all contrary to the goals and directives of the Emergency Petroleum Allocation Act.

STATUTES AND REGULATIONS

Administrative Procedure Act §3, 5 U.S.C. §553, 80 Stat. 383 (1966), set forth, infra, App. C.

The Emergency Petroleum Allocation Act of 1973, PL 93-159, 87 Stat. 627 (1973), set forth, infra, App. D.

Federal Energy Office Regulation, Chapter II, Section 210.62(b), as amended, 39 FR 5311 (February 8, 1974), set forth, infra, App. E.

STATEMENT

This case was brought in the United States District Court for the District of Arizona, under jurisdiction established by §211 of the Economic Stabilization Act of 1970, PL 92-210, and 28 U.S.C. §1391(e), for injunctive and declaratory relief challenging the validity of a Federal Energy Office regulation. The regulation, 210.62(b), in pertinent part prohibited "refusal by a retail marketer of motor gasoline or diesel fuel to furnish or sell any allocated product due to the absence of a prior selling relationship with the purchaser...", App. E, infra. Petitioner Reeves was the plaintiff in that action.

Gordon Reeves is sole proprietor of an independent Chevron-branded retail service station located in a residential neighborhood in Tucson, Arizona. Over many years, he has developed an identifiable, well-established group of customers who patronized his station on a regular basis. This patronage included both the purchase of gasoline and the provision of repair services and accessory sales. Reeves' regular customers normally accounted for 65% to 70% of his business volume. (N 13)[1]

As the District Court found (K 53), for a station like Reeves' the establishment and maintenance of a regular clientele is essential to economic success. For the independent retailer industry, sales of gasoline were shown historically to be sufficient only for payment of overhead. Profit must be drawn from accessory sales and repair work. Notwithstanding the importance of an established customer goodwill, to generate accessory sales and services, it was also undisputed that both for operations prior to the periods of gas shortage and times of shortage as well, Reeves has never, and does not, coerce or in any manner "tie" to the sale of accessory products and services the sale of gasoline (E 24; K 53).

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[1]Record references are to the document number and page in the record before the Court of Appeals.

In late 1972 and January of 1973, when gasoline supplies began to get short, Reeves experienced two interrelated phenomena. First, long lines which formed early in the morning waiting for his station to open its gas pumps consisted largely of persons who needed only "topping off," and made very small quantity purchases (K 22-27, 31). The result was that he and his employees spent virtually full time during most of the day at the gas pumps, neglecting service work. Sales naturally diminished, as people tired of "just standing from one foot to another wondering when one of my men were coming in to continue work on their car so they could leave." (M 24). Second, of course, lengthy lines for repeated small volume gasoline sales so disrupted station operations that normal and long-standing customer relationships were being jeopardized.

In response to this problem, Reeves began to sell one-half of his available gas at "open sale" hours during the morning, to any member of the general public, (M 10), and made the remaining half available to his established customers in the afternoon. When it became apparent to his regular customers that the pumps were available during the afternoon hours, the "topping off" phenomenon diminished and Reeves was able to return to his service work (M 28).

It was established in the District Court that the conditions Reeves experienced during the period of long lines

and topping off, as contrasted with the split operation, produced the same effects as would result from operations in compliance with the regulation, and would cause damage to goodwill and immediate loss of earnings. The Court found that with a divided program Reeves was able to undertake service work and sustain the established goodwill for "back room" work and sales, but that under 100% "open station" operations with substantial "topping off," Reeves lost income at the rate of $1400 per month (K 54).

A. The Regulatory Program

In late 1973, Congress passed the Emergency Petroleum Allocation Act of 1973, PL 93-159 (the EPAA), which had as its purpose:

> "§2(b)...to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system." (Emphasis supplied)

The Act directs the President to allocate petroleum products, and in doing so to implement certain goals to the maximum extent possible. Section 4(b)(1) of the Act articulated those goals. Subparagraphs (A), (B) and (C) provide for

protection of certain essential services in the public health, safety and welfare. Subparagraph (D) required:

> "Preservation of an economically sound and competitive petroleum industry; ... and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;" §4(b)(1)(D)

Subparagraphs (E), (F) and (G) direct the regulation to provide for geographic allocation and allocation to protect exploration and refining of fuel. Subparagraphs (H) and (I) provide for protection of:

> "(H) Economic efficiency and
> (I) Minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." (Emphasis supplied.)

The Federal Energy Office promulgated 10 C.F.R. Ch. II, in four parts, in response to that mandate of Congress.[2]

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[2]The authority for the regulations stems entirely from the Emergency Petroleum Allocation Act above cited, and was unchanged by the Federal Energy Administration Act, Public Law 93-275, (Cont.)

Part 205 establishes administrative procedures, methods of filing documents, definition of certain terms, and similar matters. Part 210 contains general rules applicable to the remaining two parts, which contain detailed allocation regulations and pricing regulations. The scope and purpose of Part 210 were stated to be:

> "...to set forth the provisions applicable to both Part 211-Mandatory Petroleum Allocation Regulations, and Part 212-Mandatory Petroleum Price Regulations, appearing in this chapter." 10 C.F.R. §210.1; 39 F.R. 1931 (1-15-74)

Part 211 contained detailed petroleum allocation regulations. For example, Section 211.13, 39 F.R. 1934, sets forth the procedure for obtaining an increased allocation for a supplier who can prove either (1) unusual growth since 1972, or (2) that new customers have come to the supplier and obtained allocations. The Motor Gasoline Allocation Regulations commence at §211.101, 39 F.R. 1944. These regulations established allocations of 100% of current needs for agriculture,

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[2](Continued) 88 Stat. 99, 15 U.S.C. §764, by which the Federal Energy Administrator is now the responsible administrator. At the time, actions were by the Federal Energy Office, and we refer to actions of the FEO.

emergency services, energy production, sanitation, telecommunications, and transportation services. It allocated 100% of base period (1972) use for all other business activities. There are no allocations made to private individuals.[3]

Thus, in its regulation of January 15, 1974, the FEO set up a system by which petroleum companies took care of their regular customers, and indeed were required to do so (§211.104). They were able to obtain an increased allotment of gasoline if new customers came to them (§211.13(c)). There was no allocation or rationing of gasoline to individual motorists or small businessmen, nor could retail sellers to unallocated purchasers obtain any adjustment of their own allocations for increased demand. The statute did not invest authority in the President to make any allocation or rationing to the individual user level. It only directed (and its grant was "specific" and "temporary") that allocation be made in the national distribution system.

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[3]Section 211.103 said that allocations were only for end users who were bulk purchasers of wholesale purchasers. The latter are defined in §211.60, 39 F.R. 1939, as agriculture purchasers of more than 20,000 gallons per year, multi-families consuming more than 80,000 and other purchasers who consume more than 84,000 gallons per year.

Part 212 contained price regulations not pertinent here. Part 210 contained the regulations generally applicable to the above-described allocation system. Regulation 210.62 as originally promulgated in Part 210 required suppliers to deal with purchasers according to normal business practices, and forbade practices that would circumvent any provision of "this chapter" meaning the FEO regulation comprising Parts 205, 210, 211, and 212. Since Part 211 had no allocation of gasoline at the automobile level, Regulation 210.62 as originally promulgated did not cover the relationship between the service station operator and his purchaser.

In this setting, with statute and regulations covering only the national distribution system, with the regulation silent on any allocation or rationing to individual purchasers, and with no prior notice or rulemaking procedure, the FEO published amended 210.62(b) on February 11:

> "Section 210.62(b). No supplier shall engage in any form of discrimination among purchasers of any allocated product. For purposes of this paragraph discrimination means extending any preference or sales treatment which has the effect of frustrating or impairing the objective, purposes and intent of the chapter or of the Act, and includes but is

> not limited to refusal by a retail marketer or motor gasoline or diesel fuel to furnish or sell an allocated product due to the absence of a prior selling relationship with the purchaser or establishment of a new volume purchase arrangement where customers of retailers agree in advance to purchase in excess of normal amounts of motor gasoline or diesel fuel and thereby receive preferential treatment." 39 F.R. 5311

In its release, the FEO, while stating that "the FEO has noted a serious alteration in established business practices...which result in certain purchasers being served, while others are wholly excluded", gave as the reason for dispensing with rulemaking procedures of 5 U.S.C. §553 "because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum allocation and price regulations..." (App. E, infra).

This action was brought to enjoin enforcement of and invalidate the emphasized portion of the above-quoted regulation.

B. The District Court Ruling

Based upon evidence presented, the District Court found the regulation to be

invalid, arbitrary, discriminatory and without a rational basis, its adoption invalid for want of compliance with Administrative Procedure Act notice and participation requirements, and for failure to follow requirements of the EPAA to submit the regulation to the Attorney General and the FTC for review of possible anticompetitive effects.

The District Court found (K 55) that the regulation would not further any of the statutorily mandated goals for the allocation regulations but would merely favor individuals who have a large amount of time available to wait in line for gasoline purchases. The Court also found it would substantially interfere with market mechanisms by disrupting and terminating established customer patterns, in contravention to the otherwise universal pattern of protecting other industry customer relationships.

The Court also held the regulation would threaten to drive substantial numbers of independent service stations out of business by destroying goodwill and service and accessory income, thereby resulting in an increased concentration of the petroleum retailing industry, and acceleration of vertical integration of the petroleum industry. The District Court further found that the regulation was without a rational basis because it imposed a consumer gasoline rationing obligation upon service station retailers and would destroy service station goodwill without any compensating implemen-

tation of statutory goals (K 56).

C. The Court of Appeals Opinion

The Court of Appeals reversed. It held that the amendment was properly "interpretative" of the previous "normal business practices" portion of Regulation 210.62. It also found that, based upon "facts so obvious that they may be judicially noticed" (App. A, infra, page 33) there was good cause to dispense with rulemaking procedure because such procedures were "impracticable, unnecessary, or contrary to the public interest" within the meaning of §553.

The appellate court further found that the EPAA did not require submission of amendments to the Attorney General and the Federal Trade Commission, and held that the regulation was neither arbitrary nor discriminatory, and had a rational basis. It remanded for entry of summary judgment against Reeves and in favor of the Government.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A RECURRING, IMPORTANT QUESTION ON THE PROPER STANDARD FOR REVIEWING ADMINISTRATIVE DETERMINATION THAT EXEMPTIONS TO APA §4 EXIST, WHICH THIS COURT SHOULD SETTLE, AND AS TO WHICH THE COURT OF APPEALS OPINION CONFLICTS WITH GENERAL PRINCIPLES OF ADMINISTRATIVE REVIEW ARTICULATED IN PRIOR OPINIONS OF THIS COURT.

The Emergency Petroleum Allocation Act, §5(a)(1), imposes upon the Energy Administrator the requirements of 5 U.S.C. §553 when promulgating regulations.[3] That section requires advance notification of proposed rules, an opportunity for submission of comments, and that the effectiveness of any regulation be delayed for a period of thirty days. The importance of granting such participation, in aid of informed rulemaking and as a restraint upon administrative excesses, hardly needs extensive discussion or citation. E.g., NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777 (1969) (Douglas J. dissenting); Kelly v. U.S. Department of Interior, 339 F.Supp. 1095 (E.D. Cal. 1972); H. Friendly, The Federal Administrative Agencies 45 (1962).

An agency may dispense with rulemaking procedures when issuing "interpretative" regulations, or upon finding, and stating reason why rulemaking procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(A) and (B).

The administrative agency thus has discretion to dispense with the procedures. The Court of Appeals determined, notwithstanding that the FEO concluded to dispense with rulemaking procedures because the rules were "for information and guidance," that it could uphold this

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[3]By adopting Section 207 of the Economic Stabilization Act of 1970, PL 92-210.

decision by deciding, through judicial notice, that the rule was directed to an emergency situation. This Court has not decided precisely the point in issue. But is well established that, to substitute the judgment of the reviewing court for the reasons articulated by the agency, is an improper intrusion into administrative judgmental decisions. SEC v. Chenery Corp., 332 U.S. 194 (1947); Burlington Trucklines, Inc. v. United States, 371 U.S. 164 (1962).

The clash between the holding of the court below with the well-established principle drawn from this Court's cases that review must be based upon the stated reasons of the administrative agency, can best be demonstrated by quotation from Burlington Trucklines, Inc. v. United States, supra:

> "The courts may not accept appellate counsel's post hoc rationalizations for agency action; Chenery requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> > '[A] simple but fundamental rule of administrative law... is...that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must

> judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action...' Ibid.

> "For the courts to substitute their or counsel's discretion for that of the commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate ...the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' 332 U.S., at 196" 371 U.S. at 168, 169

The Court of Appeals' position is directly contrary to that principle; and it is a considered position. In addition to its opinion in this case, the Emergency Court of Appeals has made the same determination in DeRieux v. The Five Smiths, Inc., 499 F.2d 1303 (Emer. App. 1974),[4] and California v. Simon, No. 9-12 (Emer. App. 8/12/74),[5] CCH Energy Manage-

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[4]Cert. den., No. 73-2046.

[5]Cert. den. No. 74-171; 74-181.

ment Reporter ¶26,003.

This circuit position necessarily conflicts with the standard of review applied in other circuits, which, without dwelling upon the point, approached a review of dispensing with the requirements of §553 by reviewing the rationale stated by the administrative agency. Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969); Hotch v. U.S., 212 F.2d 280 (9th Cir. 1954). Cf., Kelly v. U.S. Department of Interior, 339 F.Supp. 1095 (E.D. Cal. 1972).

As the Emergency Appeals Court noted in California v. Simon, supra, this court has not spoken directly to the issue of proper review of §553 exemptions. But the general principle requiring approval or invalidation of agency discretion on the grounds stated by the agency collides headon with the Emergency Appeals' position. The appeals court also contravenes the principle of Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937), prohibiting judicial notice of facts that are directly in issue. The extent of any emergency is the issue in question here, and the court below was clearly incorrect in applying its own personal opinion in place of the grounds stated by the FEO.

An additional difficulty with the opinion below is that, although concluding that under its own assessment of conditions there was "good cause" to dis-

pense with rulemaking procedures, its conclusion does not square with the accepted definition of "impracticable, unnecessary, or contrary to the public interest." Certainly its conclusion conflicts with the construction of those terms in Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969), and found in the legislative history of the APA, which says:

> "Impracticable means a situation which the due, timely, and required execution of agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings. Unnecessary means so far as the public is concerned, as would be the case of a minor or merely technical amendment in which the public is not particularly interested or involved. Public interest supplements the terms impracticable or unnecessary; it requires that public rulemaking procedures shall not unreasonably prevent an agency from fulfilling its duty and that, on the other hand, lack of public concern in rulemaking warrants an agency in dispensing with public procedure." HR Rep. 1980, 79th CONG., 2nd Sess., page 24.

The amendment certainly was of substantial importance, and there was no lack of

public concern in the rule. The function of the agency would hardly be unavoidably prevented by rulemaking proceedings. The vitality of the rule would not have been impaired. Compare DeRieux v. The Five Smiths, Inc., 499 F.2d 1321 (Emer. App. 1974), in which advance notice of the wage and price "freeze" would have caused changes in position impairing the effectiveness of the freeze.

This Court has not determined what constitutes good cause under the above-quoted phrase, but should do so to insure that the public has every opportunity to participate in this delegated legislative activity, except where properly dispensed with in accordance with Congressional intent.

The alternative holding of the appellate court, that the amendment could be found to be interpretative, clearly conflicts with authority from this Court and other circuits that whether a regulation is substantive or interpretative depends upon its impact, including an assessment of (1) the complexity and pervasiveness of the rule issued, (2) whether it effects drastic changes in existing laws, (3) the degree of retroactivity and its impact, and (4) the confusion and controversy engendered by practical difficulties of compliance with new rules. Columbia Broadcasting System v. U.S., 316 U.S. 407 (1942); Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972); Continental Oil

Co. v. Burns, 317 F.Supp. 194 (D. Dela. 1970); Pharmaceutical Manufacturers Association v. Finch, 307 F.Supp. 858 (D. Dela. 1970). The regulation was clearly substantive. There had been no attempt to regulate, nor did the existing regulation 210.62 (applying as it did to distributor allocations in Part 211 of the regulations) previously control non-price aspects of sales to consumers.

While enacting legislation calling for prompt regulation of energy supplies, Congress explicitly required 5 U.S.C. §553 to be followed. Energy and economic controls are a burgeoning portion of federal regulation of the lives of all citizens of this country, and §553 is their only hope of participation. The one court of appeals which reviews these regulatory agencies has all but written that section out of existence by the stance it takes. It permits the agency to arbitrarily dispense with rulemaking procedure and "roll the dice" in hopes that justification for its action can be found later by the reviewing courts.

The pervasiveness of these regulatory agencies, the role of 5 U.S.C. §553 in providing the only source of participation to the public in the functions of these agencies, and the improper standard of review established by the Emergency Court of Appeals make this case of substantial importance and its review by this Court imperative.

II. THIS COURT SHOULD REVIEW THE CONSTRUCTION OF THE EMERGENCY PETROLEUM ALLOCATION ACT BECAUSE OF THE EFFECT OF THE OPINION BELOW FOR FUTURE REGULATION IN ENERGY DISTRIBUTION.

The appeals court did not recognize that, in fact, the FEO sought by its regulation to force retail dealers to carry out a rationing program, without establishing any method by which the short fall of supply was to be allocated. The trial court put its finger on the defect when it said:

> "They made this fellow the brunt of the public wrath. They have made him an unofficial allocator of the manner in which this gasoline will be dispensed to the ultimate user. We have a multitude of systems devised by the dealers in order to make some kind of an equitable distribution of the supply that was available to them. But they were faced with an impossible task because no one had the courage to undertake to tell that ultimate user the manner in which he would get his gasoline. They shifted the whole burden off onto the retailer." (N 14-15)

And yet clearly, as the Government admitted in its brief below (pages 12, 24) and as the legislative history shows, the Allocation Act was not intended to cover consumer allocations. See House Debate of October 17, 1973:

> "This bill would not ration fuel to the consumer. Its purpose is to provide that during times of shortage, limited supplies are equitably distributed throughout the nation to meet regional needs. Regulation and enforcement would occur at the distributor level." CONG. REC. H9213, October 17, 1973.

This Congressional intent was evident throughout the legislative history.

Similarly, the appeals court did not recognize the great degree of concern evidenced by Congress that, in the course of allocating energy supplies, the perennial antitrust problems in the petroleum industry required attention. Section 6(c)(3) of the Allocation Act required that the regulation called for by §4(a) be forwarded:

> "On or before the day of its promulgation to the Attorney General and to the Federal Trade Commission, who shall... report to the President with

> respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws..." EPAA §6(c)(3).

Again one reference, representative of the legislative history cited at length to the court below, shows that Congress was greatly concerned with continued economic viability for small retail operators:

> "The Committee is especially concerned with the downstream vertical integration of the major oil companies into the distribution and retail levels of the market. Major oil companies have begun to market secondary brands through wholly owned distribution subsidiaries. The primary brands are to an increasing extent being marketed through so-called salaried or managed retail outlets. Branded independent marketers, already under short term lease and supply agreements, are finding that their agreements are not being renewed. Leases of one year's duration are being converted to thirty days. Representatives of branded dealers believe that this represents an attempt by the

> majors to force private entrepreneurs out of the retail market and to convert station operators to salaried employees. The Committee intends to watch this development closely." HR Rep. 93-531, 93rd Cong., 1st Sess., page 18.

This was the reason for the Act requiring the Energy Office to insure economic viability, and for requiring submission of regulations to the Attorney General and the Federal Trade Commission.

The appeals court improperly gave short shrift to the economic destruction wrought by the regulation, and concluded that amendments to the initial set of regulations need not be submitted for review of anticompetitive effects. Once again, legislative history was to the contrary. Senator Jackson, the manager of the Allocation Act, said in debate:

> "[I]t requires that the Attorney General review the <u>various</u> programs that are undertaken, and the regulations issued prior to the implementation of the regulations pursuant to the amendment." (Emphasis supplied) CONG. REC. (Daily Ed. June 4, 1973), S10307.

The Allocation Act is an amalgam of concern for the economic conditions of the petroleum industry and the distri-

bution of petroleum products in the national system. It did not reach consumer rationing. The construction placed upon the Act by the court below is of continuing substantial importance because additional regulation in the energy field is obviously inevitable. The impact of those regulations is all pervasive.

This Court should grant certiorari and review the construction of the EPAA rendered by the court below.

CONCLUSION

For the above reasons it is respectfully requested that the writ of certiorari be granted.

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December 1974

APPENDIX A

TEMPORARY EMERGENCY COURT
OF APPEALS OF THE UNITED STATES

No. 9-18

GORDON REEVES, d/b/a Gordon Reeves Chevron Station, and EDWARD McCULLOUGH,
Plaintiffs-Appellees,

vs.

WILLIAM E. SIMON, Director, Federal Energy Office, and DONALD C. ALEXANDER, Commission of Internal Revenue,
Defendants-Appellants.

Allen W. Hausman, Department of Justice, Washington, D.C., (Carla A. Hills, Assistant Attorney General and Stanley D. Rose, Department of Justice, Washington, D.C., with him on the brief) for the appellants.

Michael J. Meehan, Robertson, Molloy, Ficket & Jones; Tucson, Arizona for the appellees.

Before CARTER, HASTIE and CHRISTENSEN, Judges.

CARTER, Judge.

This is an appeal from the order of the United States District Court for the

District of Arizona, enjoining the Federal Energy Office (FEO) from enforcing certain of its regulations with respect to retail fuel allocation, and denying the FEO's motion for summary judgment against plaintiff-appellee, Gordon Reeves. The district court held that 10 C.F.R. Chapter II, Part 210, Subsction 210.62(b) of the Mandatory Petroleum Price & Allocation Regulations, which prohibited retail gasoline service stations from limiting sales of all or part of their monthly gasoline allocation to their regular customers to the exclusion of other motorists, was invalid, arbitrary, discriminatory and without a rational basis, and its adoption invalid for failure to comply with Administrative Procedure Act (hereafter APA) and Emergency Petroleum Allocation Act (hereafter EPAA) procedural requirements. The FEO disputes the validity of this holding in all respects. We reverse.

FACTS

Gordon Reeves is sole proprietor of an independent Chevron-branded retail service station located on the main thoroughfare of a residential neighborhood in Tucson, Arizona. His primary source of income is derived from the sale of gasoline and the provision of repair services and accessory sales.

The October, 1973, embargo of crude oil and petroleum products by the Arab nations produced shortages of all petroleum products, including gasoline. When

gasoline supplies began to get short, Reeves experienced severe difficulties, with two primary results: 1) long lines of customers (many making very small quantity purchases) forced him and his employees to spend virtually full time during most of the day at the gas pumps, thereby neglecting service work. Accessory sales and repair service thus were greatly diminished due to the long delays; 2) the long delays and lengthy lines for gasoline sales so disrupted operations that normal and long-standing customer relationships were jeopardized.

To combat the situation, Reeves divided his daily gasoline supply in half, conducting "open sale" to any member of the general public in the morning and, when one-half of the gasoline had been used, making the remaining half available to established customers in the afternoon.

In January and February of 1974 the long lines at service stations caused many other service station owners to curtail the days and hours of gasoline sales and impose restrictions on the amount of gasoline sold to individual motorists, causing instances of violence and the inability of many non-"regular" customers to obtain any gasoline at all. In response to this virtual crisis situation, the FEO added subsection (b) to § 210.62.[1] This subsection provided:

> "(b) No supplier shall engage in any form of discrimination among purchasers of any allocated product. For

purposes of this paragraph discrimination means extending any preference or sales treatment which has the effect of frustrating or impairing the objective, purposes and intent of the chapter or of the Act, and includes but is not limited to refusal by a retail marketer of motor gasoline or diesel fuel to furnish or sell an allocated product due to the absence of a prior selling relationship with the purchaser or establishment of a new volume purchase arrangement where customers of retailers agree in advance to purchase in excess of normal amounts... and thereby receive preferential treatment." (Emphasis added)

The subsection was made effective immediately and was not sent to the Attorney General or the FTC for comment as to its possible anti-competitive effect.

I

COMPLIANCE WITH § 553(d) OF THE ADMINISTRATIVE PROCEDURE ACT

Section 553(d) of the APA, 5 U.S.C. § 553(d), provides in pertinent part:

"The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except---

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule."

Reeves contends that the amendment to § 210.62 was a substantive change in the law and was not merely "interpretative." Further, he contends that the FEO based its failure to give 30-day notice on § 553(d)(2) of the APA and therefore cannot now justify its action on the good cause exception of § 553(d)(3). We reject both contentions.

In promulgating § 210.62(b), the FEO indicated its decision to dispense with the 30-day notice period with the following language:

"This amendment is issued today, in an effort to end the growing practice of sellers providing preferential treatment to customers on the basis of longstanding relationships or for any other reason. The FEA has noted a serious alteration in established business practices -- particularly with respect to gasoline and diesel fuel retail sales -- which result in certain purchasers being served, while others are wholly excluded.

"The amendment to § 210.62 concerning 'normal business practices' is addressed to this situation as well as to other preferential sales devices. Sellers whose normal business practice has been to serve the public

> may not modify that practice to sell only to 'regular customers' or otherwise discriminate among purchasers of an allocated product. . . .
>
> "Because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum allocation and price regulations, the Federal Energy Office finds that normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days." (Emphasis added).

The FEO thus believed that the amendment was necessary to combat "a serious alteration in established business practices," in violation of original § 210.62. The new subsection (b) could properly be seen to be "interpretative" of what was meant by "normal business practices." In that case, there would have been no need for the FEO to explain its decision to dispense with the 30-day notice requirement. Clearly, then, by indicating that normal rulemaking procedures were "impracticable" and that "good cause exists" due to the need for "immediate guidance", the FEO intended from the outset to comply with the provisions of §§ 553(b)(B)[2] and (d)(3) (good cause).

We are satisfied that there was in fact "good cause" to find that 30-day notice was "impracticable, unnecessary,

contrary to the public interest" within the meaning of § 553(b)(B). Like DeRieux, et al. v. The Five Smiths, Inc., T.E.C.A., Nos. 5-6, 5-7, 5-8 (June 20, 1974), cert. denied, sub nom. The Five Smiths, Inc. v. Holloway, ___ U.S. ___. (10/22/74), "[t]his conclusion is based upon facts so obvious that they may be judicially noticed." Id. at Slip Op. 25. The gasoline shortage was a temporary, but highly disruptive, national emergency. The long lines and violence required immediate action. Some purchasers were being served, while others were totally excluded. Under these circumstances, we find that the promulgation of § 210.62(b), with accompanying statement of good cause for dispensing with the 30-day notice requirement, was in conformance with the APA.

II

COMPLIANCE WITH § 6(c)(3) OF THE EMERGENCY PETROLEUM ALLOCATION ACT

In Section 4(a) of the Emergency Petroleum Allocation Act of 1973, Congress directed the President to exercise the authority delegated to him by the Act by issuing "a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in . . . and at prices specified in . . . such regulation." A precise timetable and specific procedures were established, including, in § 6(c)(3), that:

> "The regulation promulgated under section 4(a) of this Act shall be forwarded on or before the date of its promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternative which would avoid or overcome such effects while achieving the purposes of this Act."

In issuing the initial allocation and price regulation, the FEO duly complied with each of the foregoing requirements. Reeves, however, contends that the FEO was also required to submit all substantive amendments to the Attorney General and the FTC, and that § 210.62(b), having not been so forwarded, was thereby invalid. We disagree.

The detailed and specific manner for issuing the allocation and price regulation contained in the EPAA cannot reasonably be interpreted to apply to any FEO action but the initial promulgation of the § 4(a) mandated regulation. After the initial promulgation, the established rulemaking procedures of the APA were to control. This is made evident by the incorporation in § 5(a)(1) of the EPAA of §§ 205 through 211 of the Economic Stabilization Act. Section 207 of that Act makes the rule-

making provisions of § 553 of the APA applicable to the FEO.

This interpretation of § 6(c)(3) is also supported by the legislative history of the EPAA. The House Report, in a section-by-section analysis of the Act, interprets § 6(c)(3) to require reports from the Attorney General and the FTC on the "promulgation" of "the regulation" a week before "the effective date of such regulation." By contrast, § 7(a) is described as requiring the FTC "during the forty-five day period beginning on the effective date of the regulation first promulgated under section 4, to monitor the program established under such regulation; and not later than sixty days after such effective date to report . . . respecting the effectiveness of the bill and actions taken pursuant thereto." (Emphasis added).

The two-step process envisioned, then, was initial submission of the program to the Attorney General and the FTC, with subsequent review of the bill and actions "taken pursuant thereto" without submission of each action on a piecemeal basis. In light of the emergency nature of the authority delegated to the FEO and the difficulty of its duty to establish complex but fair procedures within a short time, a requirement that it submit any and every amendment to the Attorney General and the FTC would be counterproductive. We do not believe that the Act itself or the legislative history thereof establish such a requirement.

III

SECTION 210.62(b) WAS NEITHER ARBITRARY NOR DISCRIMINATORY AND HAD A RATIONAL BASIS

Section 2(b) of the EPAA provides:

> "The purpose of this Act is to grant to the President . . . specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy."

Among the objectives to be accomplished "to the maximum extent practicable" are:

> "Sec. 4.(b)(1)
>
> (D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

* * *

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

* * *

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms."

Reeves contends, and the district court so held, that the effect of § 210.62(b) was to destroy the competitive viability of branded independent retailers by forcing them to supervise a rationing system, with adverse impact upon the repair service and accessory sales portions of their businesses. The contention misconceives the burden and the duty of the FEO in attempting to effectuate the mandate of the EPAA. It would have been an impossibility to achieve all of the objectives in § 4(b)(1), supra. Priorities had to be established. The FEO attempted to minimize the adverse impacts of the shortages on the American people, and the ensure an "equitable distribution

of . . . refined petroleum products . . . among all users." It did not establish a rationing system, but instead merely forbade alteration of normal business practices so as to give preference to "regular" customers. The fact that Reeves suffered a loss of service and accessory income for a portion of one month does not invalidate the choice made by the FEO.

This Court has recognized a strong presumption in favor of administrative decisions by those agencies charged with immediate administration of a new federal statute. See University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1068-1069 (T.E.C.A. 1972); Pacific Coast Meat Job. Ass'n v. Cost of Living Council, 481 F.2d 1388, 1391-1392 (T.E.C.A. 1973); Mandel v. Simon, 493 F.2d 1239, 1240 (T.E.C.A. 1974). In Mandel, supra, the court stated: "The Federal Energy Office must have great flexibility during the formative period of regulation. Judicial interference at this time may delay rather than advance effective regulation of this area." Id. at 1240. See also Note, Phase V: The Cost of Living Council Reconsidered, 62 GEO. L.J. 1663, 1669-1673 (1974).

In issuing § 210.62(b), the FEO was attempting to minimize the impact of the shortage by spreading what gasoline there was to as many people as possible, and to prevent discrimination against non-regular customers. A first-come, first-served

policy (except for those performing essential functions, i.e., doctors, policemen, etc.), was no more inequitable than any other solution and has been approved in another context by the Supreme Court. See L.P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404-406 (1944).

Although the FEO could have provided for preferential treatment for identifiable commercial customers, or for a half and half system like that established by Reeves, the administrative problems in identifying "regular" customers at the retail level would have been immense. Most retailers would have been basing their preferential treatment on affidavits and non-reviewable standards. The possibility of unjustified discrimination would have been great. Whether or not plans could have been devised which would better effectuate the objectives of the EPAA, we cannot say that the plan chosen, and § 210.62(b) in particular, was without a rational basis.

We reverse and remand for entry of summary judgment against the plaintiff-appellee.

FOOTNOTE

[1] Section 210.62, as originally promulgated, provided in pertinent part:

> "Suppliers will deal with purchasers according to normal business practices. . . . [N]o supplier may require or impose discriminatively more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this chapter."

[2] Section 553(b)(B) provides that normal rulemaking procedures do not apply

> "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GORDON REEVES, dba Gordon Reeves Chevron Station and EDWARD McCULLOUGH, Plaintiffs,	)	NO. CIV 74-25-TUC-WCF
vs	)	
WILLIAM SIMON, Director, Federal Energy Office, and DONALD C. ALEXANDER, Commissioner of Internal Revenue, Defendants.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on plaintiff's application for injunctive relief and a declaratory judgment. After a hearing on February 19, 1974, a preliminary injunction stipulated to by the parties was entered and continued in order to maintain the status quo pending consideration on the merits of the issues raised in the complaint.

The parties submitted further evidence by legal memoranda and affidavit and the case was orally argued before the Court on April 9, 1974. By letter dated June 17, 1974, defendant submitted additional matter to be considered by the Court. Plaintiffs chose not to respond thereto.

The Court having considered the evidence presented and applicable law, finds and concludes as hereinafter set forth:

FINDINGS OF FACT

1. Plaintiff Gordon Reeves is an independent service station dealer in Tucson, Arizona, selling Chevron branded gasoline purchased on a long-term contract from Standard Oil of California, on premises leased from Standard Oil of California. Plaintiff is not owned by, controlled by, or any part of Standard Oil Company of California, but is an independent businessman.

2. Plaintiff Edward McCullough operates a small fleet of delivery trucks in connection with his business, McCullough's Flower Shop. Plaintiff McCullough's business is located in Tucson, Arizona.

3. Defendant William Simon, was at all times pertinent hereto, Administrator of the Federal Energy Office, a division of the Executive Office of the President of the United States. Defendant Donald C. Alexander is Commissioner of the Internal Revenue Service.

4. The Federal Energy Office was established by Executive Order 11748, promulgated by the President on December 4, 1973. By said order, the President delegated to the Administrator of the Federal Energy Office all of the authority

vested in him by (1) the Emergency Petroleum Act of 1973 (Pub. L. 93-159), (2) Section 203(a)(3) of the Economic Stabilization Act of 1970, as amended (Pub. L. 92-210; Pub. L. 93-28), and (3) the Defense Production Act of 1950, as amended (50 U.S.C. App. Section 2061, et seq.) as it relates to the production, conservation, use, control, distribution and allocation of energy.

5. On December 28, 1973, by FEO Order No. 3, defendant Simon delegated to the Secretary of the Treasury for redelegation to the Commissioner of Internal Revenue, subject to the general policy guidance and direction of the defendant Administrator, authority to perform compliance and enforcement functions.

6. Pursuant to the Emergency Petroleum Allocation Act of 1973, the Federal Energy Office issued final Mandatory Petroleum Allocation Regulations on December 27, 1973. Said regulations had previously been forwarded to the Federal Trade Commission and the Attorney General for comments as to any anti-competitive affect.

7. On February 8, 1974, the Federal Energy Office amended Section 210.62 of its regulations (10 C.F.R. Part 210) by redesignating the existing text as subsection (a) and adding a new subsection (b). Subsection (b) prohibits, among other practices, the refusal to sell gasoline based upon the absence of a prior

selling relationship with the customer where such practice is a change from the seller's normal business practices prior to the establishment of the mandatory petroleum allocation program. The amendment was made effective immediately.

8. The February 8, 1974 amendment was not submitted to the Federal Trade Commission or the Attorney General.

9. Prior to the establishment of the mandatory petroleum allocation program, defendant McCullough's delivery trucks were fueled and serviced on a regular and continuing basis at Reeves' Service Station.

10. Prior to the establishment of the mandatory petroleum allocation program, Reeves had established a class of commercial customers. McCullough is a member of said class of commercial customers.

11. Prior to the establishment of the mandatory petroleum allocation program, Reeves accorded the same treatment to all purchasers of gasoline, other than his commercial accounts.

12. Plaintiff Reeves has operated his service station business for seventeen and one-half years at this present location at the corner of East Broadway and Wilmot in Tucson, Arizona, which is in a primarily residential portion of the City of Tucson. Plaintiff has built up over the years an established and regular clientele, well

known to him, who regularly purchased gasoline from him, which has accounted for approximately 65% of his gasoline sales. In addition, plaintiff Reeves performs automotive mechanic services and sells accessory automotive parts. A substantial portion of plaintiff's service station income is derived from sale of such accessory parts and performance of such mechanic services.

13. At all times pertinent to this case, plaintiff Reeves has never required and does not require that any purchaser of gasoline also purchase or contract for any service work or accessories.

14. The existence of a regular clientele for the purchase of gasoline builds goodwill for service stations of the kind operated by plaintiff Reeves, which greatly aids and improves station income from service and accessory business. Sale of gasoline alone is not sufficient to successfully operate a service station, but barely covers expenses. In order for a branded independent dealer station to make a net profit it is essential to sustain a successful business in sale of accessories and performance of mechanic services.

15. In December 1973, and January and February of 1974, p..aintiff was unable to purchase sufficient gasoline to make unrestricted sales to all potential purchasers. He nonetheless attempted to serve all persons. As a result, extremely

long lines of automobiles formed for purchases which in many cases amounted to "topping off", the purchase of very small quantities of gasoline. As a result, Reeves and his employees were required to spend inordinate amounts of time pumping gas which deprived them of reasonable time to attend to service work and related business activities of the station. A further result was that customers who had routinely and regularly obtained gasoline from plaintiff Reeves in the past were unable to do so.

16. During the first two weeks of February, 1974, plaintiff Reeves changed his gasoline sales operation to reserve half of his estimated daily portion of the month's gasoline supply to regular customers, whom he would serve on one side of the station in the afternoon; and sold the remainder during the morning hours to any person who drove up to his pumps on the other side of his station. As a result the phenomenon of "topping off" was largely eliminated among regular customers, and the amount of service and accessory work plaintiff was able to accomplish was increased.

17. Plaintiff Reeves was operating his station in January in conformity with what would be required under said amended Regulation. He was operating his station in February, as to the one-half of his daily allotment sold to regular customers, in a manner which the amended Regulation attempted to prohibit.

18. Because of the "topping off" phenomenon, the inability to devote time to service and accessory sales, and the lack of opportunity to provide continuing service and accessory sales to regular customers, plaintiff Reeves suffered a loss of service and accessory income of $1400 on a monthly basis while operating his station in a manner which would conform to the requirements of said Regulation.

19. The portion of amended Regulation 210.62 B involved herein will operate to destroy goodwill of branded independent service sations like that of plaintiff Reeves.

20. The amendment of February 12, 1974, to Regulation 210.62 B was issued without advance notice, without conducting rule-making procedures in conformity with 5 U.S.C., Section 553, and was placed into effect immediately without a thirty-day waiting period.

21. The February 12, 1974, amendment to Regulation 210.62 B was not submitted in advance of its effective date, to the Federal Trade Commission or the Attorney General for review and comment on the possibility of anticompetitive impact or effect.

22. Regulations issued by the Federal Energy Office, including the amendment of February 12, 1974, to Regulation 210.62, are required to

implement to the maximum extent possible certain stated objectives and priorities of the Emergency Petroleum Allocation Act of 1973. Such priorities and criteria include protecting public health, safety and welfare; maintaining public services; maintaining agricultural operations; preserving an economically sound and competitively viable petroleum industry including branded independent marketers; equitable distribution of petroleum products among all users; economic efficiency; and minimizing economic distortion and unnecessary interference with market mechanisms. The February 12, 1974, amendment to Regulation 210.62 does not provide for any of said criteria. Said Regulation will not protect public health, public services, or further any of the uses of fuel for which the Emergency Petroleum Allocation Act directed preference. It will merely reward those individuals who have a large amount of time available to wait in line for gasoline purchases. Said Regulation works a substantial interference with market mechanisms by disrupting and terminating established customer patterns, in contravention to the pattern and practice in the remainder of the petroleum industry of protecting and extending established customer relationships, which the Emergency Petroleum Allocation Act and Federal Energy Office regulations require be protected. Said Regulation threatens to drive substantial numbers of independent service stations out of business by destroying goodwill and service and accessory income. The

result will be an increased concentration of petroleum retailing and acceleration of vertical integration of the petroleum industry.

23. The February 12, 1974, amendment to Regulation 210.62 is without a rational basis because it will impose upon independent service station retailers the obligation to ration gasoline among individual purchasers; it will destroy service station goodwill without any compensating implementation of statutory goals; and it will accomplish nothing but to reward those individuals who have extended leisure time to devote to purchasing gasoline.

24. The February 12, 1974, amendment to Regulation 210.62 is discriminatory because it prohibits gasoline retailers to continue established customer relationships, while the Emergency Petroleum Allocation Act and the other Federal Energy Office regulations implementing the Act require and encourage the continuation of established customer relationships among all other sectors of the petroleum industry. Said distinction is unreasonable and without any proper basis.

25. Plaintiff Reeves has caused to be filed and served upon the Federal Energy Office a request for reconsideration of the February 12, 1974, amendment to Regulation 210.62, and a request for exemption from the operation of Regulation 210.62. These requests for reconsideration and exemption have not been

acted on in any way nor acknowledged, and there is no reasonable prospect of an early ruling upon these requests. Plaintiff Reeves is immediately subjected to substantial criminal and civil penalties for violation of the regulation.

CONCLUSIONS OF LAW

1. This Court has jurisdiction by reason of Section 211 of the Economic Stabilization Act of 1970 as amended, PL 92-210, and 28 U.S.C., Sections 1331 and 1391(e) to enter declaratory and injunctive relief in this case upon the validity and enforceability of FEO Regulation 210.62 B as amended February 12, 1974.

2. Section 553 of the Administrative Procedure Act (Title 5, U.S.C., Section 551, et seq.) sets forth procedures to be generally followed in the issuance of regulations. That section has been made applicable to the Federal Energy Office by operation of Section 5(a)(1) of the Emergency Petroleum Act of 1973 which incorporates by reference Section 207 of the Economic Stabilization Act of 1970.

3. In determining whether there was good cause to dispense with the rule-making procedures required by 5 U.S.C., Section 553, this Court must review the reasons stated by the FEO in its issuance of the rule. Said reason was that "because the purpose of these amendments is to provide immediate guidance and

information with respect to mandatory petroleum allocation and price regulations, the Federal Energy Office finds that normal rule-making procedure is impracticable and that good cause exists for making these amendments effective in less than thirty days." Contrary to the stated reason for dispensing with rule-making procedures, the amendment imposes, a new, substantive, far-reaching regulatory provision upon service station retailers. Therefore the requirements of Section 553 of Title 5, United States Code, authorizing an exception to rule-making procedures in that Section were not followed and did not apply, and advance notice and a thirty-day delay in effective date, together with the opportunity to submit comments should have been afforded to persons such as plaintiff Reeves. Therefore Regulation 210.62 B was invalidly adopted.

4. Even if this Court were entitled to adopt defendants' reliance on the first paragraph of the Federal Energy Office release of February 8, 1974, 39 FR 5311 (beginning "This amendment is issued today...") said paragraph does not contain a sufficient finding that notice and public procedure are impracticable, unnecessary, or contrary to the public interest as would support a conclusion of good cause to dispense with such notice and procedures. Therefore the requirements of 5 U.S.C., Section 553 should have been followed and the February 12, 1974, amendment to Regulation 210.62 B was invalidly adopted.

5. Section 6(c)(3) of the Emergency Petroleum Allocation Act of 1973, PL 93-159, 87 Stat. 627, requires:

> "The regulation promulgated under Section 4(a) of this Act shall be forwarded on or before the date of its promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternative which would avoid or overcome such effects while achieving the purposes of this Act."

Said Section applies to substantial amendments to the initial set of regulations, and was intended by Congress to apply to such substantial amendments. The amendment to Regulation 210.62 B, sub judice, is a substantial amendment and should have been submitted to the Federal Trade Commission and the Attorney General in accordance with the procedures of the above-cited Section. Said Regulation was invalidly adopted because such submission was not accomplished.

6. The Federal Energy Office exceeded statutory authority by imposing the Regulation sub judice upon retail

service station operators, by requiring them to undertake a consumer gasoline rationing program when the FEO itself could not have done so.

7. Said Regulation is arbitrary and capricious and lacks a rational basis.

8. Said Regulation is discriminatory.

9. This Court is empowered under 5 U.S.C., Section 706 to set aside agency action which is arbitrary, capricious, in excess of statutory jurisdiction or without observance of procedure required by law. 5 U.S.C., Section 706 and its criteria are made applicable to the Regulation now before this Court, by virtue of Section 211(e)(1) and (d)(2) of the Economic Stabilization Act of 1970 as amended. Regulation 210.62 B is invalid under the criteria of Section 211 of the Economic Stabilization Act and Section 706 of the Administrative Procedure Act.

10. However, assuming arguendo the validity of the amended Regulation, plaintiff Reeves' practice of continuing to serve commercial accounts on the same preferential basis as before does not constitute a violation of the Federal Energy Office regulations, and particularly Section 210.62 since there has been no change in normal business practice.

11. Plaintiff McCullough is not a true party in interest and has no standing herein.

12. This Court may and should enter its declaratory judgment setting aside said Regulation and enter an injunction against enforcement of said Regulation as against plaintiff Reeves.

13. The action should be dismissed as to plaintiff McCullough.

DATED this 19th day of July, 1974.

WILLIAM C. FREY
United States District
Judge

APPENDIX C

5 U.S.C. §553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 383.

APPENDIX D

The Emergency Petroleum Allocation Act of 1973, PL 93-159, 87 Stat. 627 (1973)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Emergency Petroleum Allocation Act of 1973".

Emergency Petroleum Allocation Act of 1973.

87 STAT. 627
87 STAT. 628

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

DEFINITIONS

SEC. 3. For purposes of this Act:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to—

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner),

but who is not affiliated with, controlled by, or under common control with any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B)), and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined

petroleum products, but who (A) is not a refiner, (B) is not a person who controls, is controlled by, is under common control with, or is affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

87 STAT. 628
87 STAT. 629

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to the date of enactment of this Act, more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

MANDATORY ALLOCATION

Regulation.

SEC. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

Effective date.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for—

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, mar-

keting, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

Price regulations.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—

(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

Allocation, consideration for certain persons.

(3) The President in promulgating the regulation under subsection (a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

Refined petroleum and crude oil products.

(c)(1) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide—

Pro rata reductions.

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount

produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

Presidential report to Congress.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in—

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

Allocation adjustment.

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary—

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d) of this section are attained.

LPG allocation.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

Oil produced or refined in U.S.

(d) The regulation under subsection (a) shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for use by ultimate users within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b).

Crude oil prices at producer level, exemption.

(e)(1) The provisions of the regulation under subsection (a) shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require

allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b)(1)(E) or the other objectives of subsections (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the President's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence. Report to Congress.

(2)(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

(f)(1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation. Gasoline allocation.

(2) If—

(A) an order or regulation under section 203(a)(3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment of this Act, and 85 Stat. 743, 12 USC 1904 note.

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a)(3) to the mandatory allocation program required under this Act,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph. Presidential report to Congress.

(g)(1) The regulation promulgated and made effective under subsection (a) shall remain in effect until midnight February 28, 1975, except that (A) the President or his delegate may amend such regulation so long as such regulation, as amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petrolum product from such regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regulation and to issue any order under this section, and to enforce under section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975. Termination date. Exemptions.

Regulation amendment.

(2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.

Effective date.

ADMINISTRATION AND ENFORCEMENT

SEC. 5. (a)(1) Except as provided in paragraph (2), (A) sections 203 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

85 Stat. 747, 748. 12 USC 1904 note.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

(b) The President may delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

EFFECT ON OTHER LAWS AND ACTIONS TAKEN THEREUNDER

SEC. 6. (a) All actions duly taken pursuant to clause (3) of the first sentence of section 203(a) of the Economic Stabilization Act of 1970 in effect immediately prior to the effective date of the regulation promulgated under section 4(a) of this Act, shall continue in effect until modified pursuant to this Act.

(b) The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

(c)(1) Except as specifically provided in this subsection, no provisions of this Act shall be deemed to convey to any person subject to this Act immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws. Immunity restrictions.

(2) As used in this subsection, the term "antitrust laws" includes— "Antitrust laws".

(A) the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1 et seq.); 26 Stat. 209;

(B) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (15 U.S.C. 12 et seq.); 69 Stat. 282. 38 Stat. 730;

(C) the Federal Trade Commission Act (15 U.S.C. 41 et seq.); 49 Stat. 152;

(D) sections 73 and 74 of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894 (15 U.S.C. 8 and 9); and 38 Stat. 717; 52 Stat. 111. 28 Stat. 570.

(E) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a).

(3) The regulation promulgated under section 4(a) of this Act shall be forwarded on or before the date of its promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternative which would avoid or overcome such effects while achieving the purposes of this Act. Report to President.

(4) Whenever it is necessary, in order to comply with the provisions of this Act or the regulation or any orders under section 4 thereof, for owners, directors, officers, agents, employees, or representatives of two or more persons engaged in the business of producing, refining, marketing, or distributing crude oil, residual fuel oil, or any refined petroleum product to meet, confer, or communicate in such a fashion and to such ends that might otherwise be construed to constitute a violation of the antitrust laws, such persons may do so only upon an order of the President (or of an officer or agency of the United States to whom the President has delegated authority under section 5(b) of this Act); which order shall specify and limit the subject matter and objectives of such meeting, conference, or communication. Moreover, such meeting, conference, or communication shall take place only in the presence of a representative of the Antitrust Division of the Department of Justice, and a verbatim transcript of such meeting, conference, or communication shall be taken and deposited, together with any agreement resulting therefrom, with the Attorney General and the Federal Trade Commission, where it shall be made available for public inspection. Meeting.

(5) There shall be available as a defense to any action brought under the antitrust laws, or for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this Act or with the regulation or any order under section 4 of this Act.

(6) There shall be available as a defense to any action brought under the antitrust laws arising from any meeting, conference, or communication or agreement resulting therefrom, held or made solely for the purpose of complying with the provisions of this Act or the regulation or any order under section 4 thereof, that such meeting, conference, communication, or agreement was carried out or made in accordance with the requirements of paragraph (4) of this subsection.

MONITORING BY FEDERAL TRADE COMMISSION

SEC. 7. (a) During the forty-five day period beginning on the effective date on which the regulation under section 4 first takes effect, the Federal Trade Commission shall monitor the program established under such regulation; and, not later than sixty days after such effective date, shall report to the President and to the Congress respecting the effectiveness of this Act and actions taken pursuant thereto.

Report to President and Congress.

(b) For purposes of carrying out this section, the Federal Trade Commission's authority, under sections 6, 9, and 10 of the Federal Trade Commission Act to gather and compile information and to require furnishing of information, shall extend to any individual or partnership, and to any common carrier subject to the Acts to regulate commerce (as such Acts are defined in section 4 of the Federal Trade Commission Act).

38 Stat. 721; 84 Stat. 929; 52 Stat. 909. 15 USC 46, 49, 50.

Approved November 27, 1973.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-531 accompanying H.R. 9681 (Comm. on Interstate and Foreign Commerce) and 93-628 (Comm. of Conference).
SENATE REPORT No. 93-159 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 119 (1973):
May 31, June 1,4,5, considered and passed Senate.
Oct. 17, considered and passed House, amended, in lieu of H.R. 9681.
Nov. 13, House agreed to conference report.
Nov. 14, Senate agreed to conference report.

APPENDIX E

Federal Energy Office Regulation, Chapter II, Section 210.62(b), as amended, 39 FR 5311 (February 8, 1974)

CHAPTER II—FEDERAL ENERGY OFFICE

PART 210—GENERAL ALLOCATION AND PRICE RULES

Refusal To Sell Product

This amendment is issued today in an effort to end the growing practice of sellers providing preferential treatment to customers on the basis of long-standing relationships or for any other reason. The FEO has noted a serious alteration in established business practices—particularly with respect to gasoline and diesel fuel retail sales—which result in certain purchasers being served, while others are wholly excluded.

The amendment to § 210.62 concerning "normal business practices" is addressed to this situation as well as to other preferential sales devices. Sellers whose normal business practice has been to serve the public may not modify that practice to sell only to "regular customers" or otherwise arbitrarily discriminate among purchasers of an allocated product. The amendment is also aimed at outlawing new preferential volume purchase arrangements in which retail gasoline customers sign up to purchase for example, 1,000 gallons, or $50 worth of gasoline, or this month's requirements in advance and thereby receive preferential treatment.

Because the purpose of these amendments is to provide immediate guidance and information with respect to the mandatory petroleum allocation and price regulations, the Federal Energy Office finds that normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33575; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11730, 38 FR 19345; Cost of Living Council Order 47, 39 FR 24)

In consideration of the foregoing, Part 210 of Chapter II, Title 10 of the Code of Federal Regulations is amended as set forth below, effective immediately.

Issued in Washington, D.C., February 8, 1974.

WILLIAM N. WALKER,
General Counsel,
Federal Energy Office.

Section 210.62 is amended by redesignating the existing text as paragraph (a), and adding a new paragraph (b) to read as follows:

§ 210.62 Normal business practices.

* * * * *

(b) No supplier shall engage in any form of discrimination among purchasers of any allocated product. For purposes of this paragraph, "discrimination" means extending any preference or sales treatment which has the effect of frustrating or impairing the objectives, purposes and intent of this chapter or of the Act, and includes, but is not limited to, refusal by a retail marketer of motor gasoline or diesel fuel to furnish or sell any allocated product due to the absence of a prior selling relationship with the purchaser, or establishment of new volume purchase arrangements where customers of retailers agree in advance to purchase in excess of normal amounts of motor gasoline or diesel fuel and thereby receive preferential treatment.

[FR Doc.74-3037 Filed 2-11-74;12:41 pm]

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-811

GORDON REEVES, PETITIONER

v.

THE FEDERAL ENERGY ADMINISTRATOR AND
THE COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet App. A) is not yet reported. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on November 27, 1974. The petition for a writ of certiorari was filed on December 26, 1974. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 87 Stat. 27, and 28 U.S.C. 1254(1).[1]

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[1]See also Section 5(a) of the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633, incorporating Section 211(g) by reference.

QUESTIONS PRESENTED

Federal Energy Office (F.E.O.) Regulation 10 C.F.R. 210.62(a) prohibits suppliers of allocated gasoline from modifying normal business practices to circumvent the allocation regulations. During the fuel crisis of February 1974, F.E.O. amended the regulation by adding Section 210.62(b), providing that preferential treatment to regular customers would be considered a variation from normal business practice. The questions presented are:

1. Whether the Temporary Emergency Court of Appeals correctly held that F.E.O. was not required by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to publish a general notice of proposed rulemaking in the Federal Register 30 days prior to the implementation of Section 210.62(b), where good cause existed to make that section effective immediately.

2. Whether the Temporary Emergency Court of Appeals correctly held that the Emergency Petroleum Allocation Act of 1973, P.L. 93-157, 87 Stat. 627, does not require that amendments to regulations issued under Section 4(a) of the Act be submitted to the Federal Trade Commission and the Attorney General for comment on whether such amendments would tend to create or maintain anti-competitive practices or situations inconsistent with the antitrust laws.

3. Whether the Temporary Emergency Court of Appeals correctly held that F.E.O. acted within its statutory authority in adopting Section 210.62(b) and that the regulation was neither arbitrary nor discriminatory and has a rational basis.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Administrative Procedure Act, 80 Stat. 383, 5 U.S.C. 553, and the Emergency Petroleum Allocation Act of 1973, P.L. 93-157, 87 Stat. 627, as extended by P.L. 93-511, 88 Stat. 1608, are set forth at Pet. Apps. C and D. 10 C.F.R. 210.62(b) is set forth at Pet. App. E 66. 10 C.F.R. 210.62(a) is set forth in the Appendix to this brief in opposition.

STATEMENT

Petitioner seeks review of a decision of the Temporary Emergency Court of Appeals upholding the validity of an amendment (10 C.F.R. 210.62(b)) to the Mandatory Petroleum Allocation and Price Regulations (10 C.F.R. Parts 210-212) which prohibits retail gasoline service station operators from changing their normal business practices to reserve all or part of a monthly allocation for regular customers. Prior to the amendment, 10 C.F.R. 210.62 had prohibited deviations from normal business practices to circumvent allocation regulations (App., *infra*). When a practice of favoring regular customers arose during the fuel crisis of early 1974, the Federal Energy Office expressly prohibited such discriminatory sales practices by the amendment to 10 C.F.R. 210.62 in question, which redesignated the existing text as subsection "(a)" and added a new subsection "(b)" (Pet. App. E), 39 Fed.Reg. 5311, February 8, 1974.

The court of appeals, reversing the United States District Court for the District of Arizona, found that the amendment was issued in accordance with the rule-making procedures of the Administrative Procedure Act, 5 U.S.C. 553; that it did not have to be submitted for comment to the Attorney General and the Federal

Trade Commission pursuant to Section 6(c)(3) of the Emergency Petroleum Allocation Act of 1973, P.L. 93-157, 87 Stat. 627 (the EPAA); and that it was neither arbitrary nor discriminatory, and had a rational basis (Pet. App. A).

The history of the regulations is as follows. Congress responded to the domestic shortage of petroleum resulting from the imposition of an embargo by oil-producing nations by passing the Emergency Petroleum Allocation Act of 1973. Section 4 of that Act directed the President to establish regulations to allocate available supplies of crude oil and refined petroleum products and to control their prices. To do this the Federal Energy Office was created by Executive Order 11748, 38 Fed. Reg. 33575, December 4, 1973.[2] On December 11, 1973 it published proposed allocation and price regulations, 38 Fed.Reg. 34414, which it forwarded to the Attorney General and the Federal Trade Commission for comment pursuant to Section 6(c)(3) of the EPAA.

Final regulations were adopted on December 27, 1973 (Mandatory Fuel Allocation Regulations, 39 Fed.Reg. 744 *et seq.*, January 2, 1974), in accordance with the timetable established by Congress in Section 4(a) of the EPAA. They were recodified in 10 C.F.R. and renumbered on January 15, 1974, 39 Fed. Reg. 1924.

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[2]The functions of the Federal Energy Office were transferred to the Federal Energy Administration, created by the Federal Energy Administration Act of 1974, P.L. 93-275, 88 Stat. 96, May 7, 1974, by Executive Order 11790, 39 Fed. Reg. 23185, June 25, 1974.

The impact of the embargo in the form of shortages of gasoline available for retail sale became severe during the early months of 1974. As a result of the shortage, there were extreme disruptions in ordinary market mechanisms, especially in the retail sale of gasoline. Among other things, F.E.O. received information that some retail gasoline service stations were reserving all or part of their monthly allocations for persons recognized as "regular customers," and transient customers, who were formerly served, were being turned away (R. I 44-45).[3] In response to this development (R. I 44-47, pars. 15-18 and 20), F.E.O. amended its regulations by adding the amendment at issue here.

ARGUMENT

1. Petitioner contends (Pet. 2, 14-20) that F.E.O.'s immediate implementation of its amended regulation violated the Administrative Procedure Act and that the court of appeals improperly found "*post hoc*" reasons for upholding the regulation. But F.E.O. fully explained the reason for immediate implementation of the amendment in the four-paragraph preface to its regulation (see Pet. App. E 65-66). The court of appeals, in turn, carefully considered these stated reasons for implementing the amendment, and found that F.E.O. had determined that "normal rulemaking procedures were 'impracticable' and that 'good cause exists' due to the need for 'immediate guidance' " to have the rules apply im-

[3] "R. I" refers to the first volume of the stipulated record on appeal, which we are lodging with the Clerk. The references are to the affidavit of Mr. William N. Walker, then general counsel of the F.E.O.

mediately (Pet. App. A 32). The court concluded that "the F.E.O. intended from the outset to comply with the provisions of [5 U.S.C.] §§553 (b)(B) and (d)(3)" allowing an agency to adopt an immediate regulation where good cause exists for deviating from normal notice (*ibid.*, footnote omitted). The court also noted that F.E.O. could have characterized the amendment as interpretive, in which case there would have been "no need for [it] to explain its decision to dispense with the 30-day notice requirement," but had not done so. The court of appeals examined whether good cause for the immediate enforcement of the regulation in fact existed, considering the special circumstances at the time the regulation was issued, and properly held that it did (Pet. App. A 32-33). This case, thus, contrary to petitioner's contention, does not present an example of a *post hoc* rationalization of an agency decision to issue an emergency regulation.

2. Petitioner argues (Pet. 25) that this Court should grant its petition because the court of appeals gave "short shrift" to its argument that every substantive amendment to the Mandatory Petroleum Allocation and Price Regulations must be submitted to the Attorney General and the Federal Trade Commission pursuant to Section 6(c)(3) of the EPAA (see Pet. App. D 62-63 for text of the provision). The court of appeals, however, considering in some detail the language of the Act, its legislative history, and the purpose of Justice Department and Federal Trade Commission approval of regulations (Pet. App. A 33-35), concluded that such approval was contemplated only for initial regulations. As the court concluded (Pet. App. A 35):

> The two-step process envisioned, then, was initial submission of the program to the Attorney General and the FTC, with subsequent review of the bill and actions "taken pursuant thereto" without submission of each action on a piecemeal basis. In light of the emergency nature of the authority delegated to the FEO and the difficulty of its duty to establish com-

plex but fair procedures within a short time, a requirement that it submit any and every amendment to the Attorney General and the FTC would be counterproductive. We do not believe that the Act itself or the legislative history thereof establish such a requirement.

3. The court of appeals also properly concluded that Section 210.62(b) was within the statutory authority of F.E.O., was neither arbitrary nor discriminatory, and had a rational basis. The court correctly found that in issuing Section 210.62(b) F.E.O. was "attempting to minimize the impact of the shortage by spreading what gasoline there was to as many people as possible" (Pet. App. 38). This did not constitute an unauthorized rationing system, as petitioner suggests (Pet. 22). Section 210.62(b) did not provide any particular amount of gasoline for each customer but only tended to insure equal access to what was available. The pursuit of this goal was clearly a reasonable exercise of F.E.O.'s power and was in furtherance of the statutory objectives.[4]

The decision of the Temporary Emergency Court of Appeals does not conflict with any decision of this Court or of any other court of appeals, and there is no broad question of statutory interpretation or administrative law raised by the case. Additionally, should an oil crisis comparable to that of the early months of 1974 arise again, there is no indication that either the present statutes or present regulations will be in effect.

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[4]For the text of the rather broad statutory objectives see EPAA, Section 4(b)(1), Pet. App. D 58-59.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant to the Solicitor General.

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MARCH 1975.

APPENDIX

Federal Energy Office Regulation, 10 C.F.R. 210.62, 39 Fed. Reg. 1931, before amendment of February 8, 1974, 39 Fed. Reg. 5311.

§ 210.62 **Normal business practices.**

Suppliers will deal with purchasers according to normal business practices. Nothing in this program shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for products. However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (*e.g.*, COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this chapter.

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

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On Petition For A Writ of Certiorari To The Temporary Emergency Court of Appeals of the United States

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PETITIONER'S REPLY BRIEF

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Citations

Cases:

Burlington Truck Lines, Inc., v. United States, 371 U.S. 164, 169 (1962)	2
California v. Simon, 504 F.2d 750, (Em.App. 1974)	2
Columbia Broadcasting System v. U.S., 316 U.S. 47 (1942)	3
De Rieux v. The Five Smith, Inc., 499 F.2d 1303 (Em.App. 1974)	2,3
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Other Authorities:

Bonfield, Military and Foreign Affairs Rulemaking Under the APA, 71 MICH. L. REV. 221, 304 (1972)	3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-811

GORDON REEVES,
Petitioner

v.

THE FEDERAL ENERGY ADMINISTRATOR AND THE COMMISSIONER OF INTERNAL REVENUE,
Respondents

On Petition For a Writ of Certiorari To The Temporary Emergency Court of Appeals of the United States

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PETITIONER'S REPLY BRIEF

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1. The Administrative Procedure Act Issue.

The Government denigrates the importance of this case by contending (BR. p.7) "there is no indication that either present statutes or present regulations will be in effect" if petroleum again becomes scarce. This is pure speculation. The contrary assumption is warranted.

The EPAA has already been extended once, and Petitioner is still very much constrained by Reg. 210.62(b).

More to the point, however, is the troublesome precedent created by the Emergency Appeals Court. This case, following closely upon De Rieux v. The Five Smiths, Inc., 499 F.2d 1303 (Em.App. 1974), and California v. Simon, 504 F.2d 750 (Em.App. 1974), makes plain that Court's belief that it may decide for itself whether the Administrator had "in fact 'good cause' to find" that Administrative Procedure Act §553 need not be followed (Pet., App A, p. 32). Moreover, each of these three cases evinces its further belief that it could do so on judicial notice (Id. at 33).

But dispensing with rulemaking procedures is a discretionary act, to be "upheld on the same basis articulated by the agency itself," Burlington Truck Lines, Inc. v. United States, 371 U.S. 164, 169 (1962). The Emergency Appeals Court must "judge the propriety of such action solely by the grounds invoked by the agency", SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). As a construction of 5 U.S.C. §553, the opinion below is of much wider significance even than its impact on the pervasive government regulation of energy matters. And it unavoidably conflicts with the above-cited opinions of this Court.

The agency rationale for avoidirg public participation was not any belief in an emergency requiring instantaneous action. As the Appeals Court found (Pet.,

App A, p. 32) and the Government is forced to admit (BR. p. 5), Gordon Reeves and others like him, vitally interested in FEO regulations, were excluded from commenting on Reg. 210.62(b) because it was (supposedly) "due to the need for 'immediate guidance.'" Ibid. Had the Court below properly focussed its review on that stated reason, it would have been forced to invalidate the regulation.

Clearly, the "interpretative" exception to §553 did not apply. This was no clarification of existing Reg. 210.62, which was admittedly designed to prohibit "modifying normal business practices to circumvent the allocation regulations" (BR p. 2) (Emphasis supplied). There were and are no allocations of Reeves' sales to the public. It plainly was a new, substantive regulation. Columbia Broadcasting System v. U.S., 316 U.S. 47 (1942).

A review of the question of whether the "interpretative" exception applied exhausts the scope of review, for that is all that the agency relied upon. But even a determination of impracticability, as allowed by 5 U.S.C. §553 would be erroneous. That term applies where delay would cause the very evil the regulation is designed to thwart. E.g., De Rieux v. The Five Smiths, Inc., 499 F.2d 1303 (Em. App. 1974) (advance notice of proposed price freeze would cause accelerated wage-price spiral). Cf. Bonfield, Military and Foreign Affairs Rulemaking Under the APA, 71 MICH. L. REV. 221, 304 (1972).

The ramifications of the opinion below, for compliance by all federal

agencies with APA requirements, are substantial. It invites a procedure which nullifies that section, and the opinion should be reviewed and reversed.

2. Submission For Antitrust Review.

Because there is no indication that the Emergency Petroleum Allocation Act will at any time soon be replaced, the question of antitrust review remains of significance.

The Court below thought that the existence of the Administrative Procedure Act and the provision in Section 7 of the EPAA for a 45-day review of the effectiveness of the Act precluded submission of amendments to the EPAA regulations for antitrust review. Although the Emergency Appeals Court made passing reference to one portion of the Legislative History, it completely ignored major parts of the debate which indicated an intent contrary to that found below. Moreover, the existence of the Administrative Procedure Act has no bearing on whether the agency is bound by other requirements. Section 6(c)(3) of the EPAA calls for the expertise of the Justice Department and the Federal Trade Commission to review energy regulations for anticompetitive effects. The APA serves entirely different purposes, calling for public comment to enlighten bureaucratic personnel who might not appreciate differing points of view without such comment and participation.

Finally, a 45-day study of the energy regulatory proceedings implemented pursuant to the statute hardly takes care of

anticompetitive effects of amendments after that time, nor is it a valid substitute for an opportunity to redirect regulations before their implementation if anticompetitive effects are found.

3. The Rationality of Standardless Imposition of Retail Allocation on Service Stations.

The Government continues to take what is an impossibly contradictory position. We do not yet understand it to contend that allocation authority was granted by the EPAA over the retail sales of gasoline. Nor do we understand the Government to contend it had authority from any other statutory source to impose regulations upon the sales of retail gasoline. Moreover, it admits that there was not enough gasoline to fill all demands of all purchasers. Its response was to cast upon the retailer the entire burden of making supplies stretch to purchasers. We continue to contend that such standardless delegation completely lacks rationality, exceeded statutory authority, failed to implement any statutory goals, and cast the retailer into the impossible position of destroying established relationships and the retailer's business as well as forcing the retailer to "bear the brunt of the public wrath".

There is nothing in the record, or available to this Court, to indicate that any other statutory program will supersede this regulation. The problem is one of continuing critical importance for thousands of retailers, and we urge the

Court to grant review and reverse the Court below.

Respectfully submitted,

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